SUPREME COURT, U. S.

APR 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1594

CEMENT TRANSPORT, INC., - - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JAMES U. SMITH, JR.,
LOUIS E. WOOLERY,
500 Marion E. Taylor Building,
Louisville, Kentucky 40202
Attorneys for the Petitioner.

SMITH and SMITH,
Louisville, Kentucky
Of Counsel.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

CEMENT TRANSPORT, INC., - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cement Transport, Inc. (hereafter called "the Company"), by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in the above-captioned case on January 22, 1974 and the order and judgment of the Court of Appeals rendered on March 4, 1974 denying the Company's petition for rehearing herein.

OPINIONS BELOW.

The opinion of the Court of Appeals of January 22, 1974 is reproduced in Appendix A hereto (pages 1a-11a) and is reported at —— F. 2d ——, 73 CCH Lab. Cas. ¶14,250 (1974). The opinions and orders of the administrative law judge and the National Labor Relations Board in this case (which were enforced by

the Court of Appeals) are reproduced in Appendix B hereto (pages 12a-46a) and are reported at 200 NLRB No. 122 (1972).

JURISDICTION.

The aforesaid judgments and order of the Court of Appeals were dated and entered on January 22, 1974 and March 4, 1974, respectively. (Appendix A, page 1a.) The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether it was erroneous, improper and unsupported by substantial evidence on the record considered as a whole for the National Labor Relations Board and the Court of Appeals to hold that a single owner-driver for the Company was not an independent contractor within the meaning of Section 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. §152(3), where the undisputed evidence shows that the Company exercises no control over the owner-drivers' manner and methods of operation other than is required of it by the Interstate Commerce Commission and the United States Department of Transportation, where the Board itself has previously determined that those owner-drivers were independent contractors, and where the Board and the Courts have found that owner-drivers for other companies are independent contractors under facts and circumstances identical to the case at bar.

2. Whether it was erroneous, improper and unsupported by substantial evidence on the record as a whole for the Board and the Court of Appeals to hold that the Company terminated single owner-driver Edgar Ray Thompson because of his union activities, in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(3), where the record clearly establishes that the Company terminated Thompson because of his false, malicious and slanderous accusations about the Company allegedly bribing a union official by paying him $20,000.00 per year.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*) are set forth verbatim in Appendix C hereto (pages 46a-48a).

STATEMENT OF THE CASE.

A great many of the facts in this case are set out in the opinions of the Court of Appeals, the Board and the administrative law judge (including Appendix A thereto). However, we believe it is in order to very briefly review those facts for the benefit of this Court.

Owner-Drivers as Independent Contractors. The Company is an over-the-road common carrier engaged primarily in hauling cement for one customer. It leases all of the tractors used in its hauling, and under its standard lease form the tractor owner agrees to furnish not only the tractor but also a driver for it.

Thompson was such an owner-driver with a single tractor leased to the Company. (Appendix A, page 2a; Appendix B, pages 17a, 37a-39a.)

The Company has no requirements as to what kind, make or model of tractor the owner-drivers lease to it, nor does the Company have anything to do with the purchasing or financing of the leased tractors. A new tractor costs an owner-driver up to $30,000.00, with the average cost being around $22,000.00. (Appendix B, page 39a; J.A.* 74-78, 98.)

The owner-drivers pay for all maintenance, fuel, oil, tires, taxes, licenses and other expenses of operating their tractors. (Appendix B, pages 39a, 41a ; J.A. 78-80, 97-98, 138.) To quote the decision of a Regional Director of the Board (Appendix A to the administrative law judge's decision), "The tractor owners, in return for the use of their equipment and services of themselves or their drivers, receive payments from the Employer based on the amount of freight carried and the mileage covered according to certain geographical zones." (Appendix B, page 39a.) The average gross annual income of the single owner-drivers is approximately $25,000.00. (J.A. 100-101.)

An owner-driver's net income (or profit) consists of the difference between these rental payments made to him by the Company and his operating expenses. Indeed, the Regional Director found that "the owners have some opportunity to increase their profits by saving money on purchases of parts and repair costs, and

*"J.A." refers to the Joint Appendix of the Board and the Company in the Court below.

by hauling for other customers when the Employer's business is slow." (Appendix B, page 41a.)

Owner-drivers themselves choose the loads they haul and they also decide *when* to haul for the Company. (J.A. 83, 86, 88-89.) As the Regional Director (Appendix B, pages 40a-41a) and the Court of Appeals (Appendix A, page 3a) found, ". . . tractor owners are not required to haul exclusively for the Employer and have, in fact, hauled for other employers while under a lease agreement with the Employer . . .", and the owner-drivers "keep the profit" derived from their hauling for other firms.

Moreover, the Company "does not exercise any control over the route to be used by the driver" and "leaves the choice of roads to its drivers as a matter of practice". (Appendix A, page 3a; Appendix B, pages 40a-41a.) ". . . the owners and drivers of the leased equipment frequently interchange trips . . ." without the Company knowing anything about it. (Appendix B, page 40a; J.A. 83-84.) Owner-drivers also have freedom of choice as to when to leave to make deliveries. (J.A. 142, 146-147.)

Unlike its admitted employees, the Company does not treat the owner-drivers as its employees for income or Social Security tax or unemployment compensation purposes. (Appendix B, page 41a; J.A. 69-70, 81-82, 135, 167.) The Company only exercises control over the owner-drivers and their equipment to the extent that it is required to do so by the Interstate Commerce Commission, the United States Department of Transportation and the Kentucky Department of Motor Transportation. (J.A. 101, 120-121.)

Thompson's False Accusations. In addition to other false and threatening statements made by Thompson about the Company, several drivers testified that on numerous occasions before the termination of his lease by the Company, Thompson told them the Company had bought off Teamsters Local 89 and was paying Local 89 Business Agent Dick Fischer $20,000.00 per year to keep the Union out of the Company. These statements were completely false and unfounded. (J.A. 368-370, 395, 405, 414-416, 438, 471.) Thompson's lease was terminated by the Company because of his false accusations about bribing the Union. (J.A. 478.)

The administrative law judge (Appendix B, pages 26a, 32a), the Board (Appendix B, page 13a), and the Court of Appeals (Appendix A, pages 4a, 6a, 11a) found that Thompson was an employee of the Company who was discharged because of his union activities, in violation of Section 8(a)(3) of the National Labor Relations Act. Both the Board and the Court decisions were decided by 2-1 majorities, with Board Chairman Miller (Appendix B, page 14a) and Judge O'Sullivan (Appendix A, page 11a) dissenting.

REASONS FOR GRANTING THE WRIT.

The decision in this case by the Court of Appeals merits review by the Supreme Court within the criteria prescribed by Rule 19 of the Revised Rules of the Supreme Court of the United States because that decision is in conflict with decisions of the Supreme Court, the Seventh Circuit Court of Appeals, the National Labor Relations Board and the Sixth Circuit Court of

Appeals itself with respect to the independent contractor status of owner-drivers and the reason for Thompson's termination; because the Sixth Circuit's decision decided important questions of Federal law which have not been, but should be, settled by the Supreme Court; and because the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Owner-Drivers as Independent Contractors. It is well settled and universally acknowledged that independent contractors are not covered by the National Labor Relations Act. See Footnote 2 to the decision of the Court below. (Appendix A, page 3a.) It is also clear that general common law principles of agency and the "right to control" test are applied to determine whether or not a person is an independent contractor. *N.L.R.B.* v. *United Insurance Company of America,* 390 U. S. 254 (1968).

However, the administration and application of those principles by both the Courts and the Board have not been uniform with respect to owner-drivers in the over-the-road trucking industry. For example, such owner-drivers were held to be independent contractors in *National Van Lines, Inc.* v. *N.L.R.B.,* 273 F. 2d 403 (7th Cir. 1960), under facts and circumstances far sketchier than those in the case at bar.

On the other hand, the Sixth Circuit has recently taken the position, in essence, that owner-drivers can never be independent contractors if the operations of the carrier for whom they drive are subject to the rules

and regulations of the Interstate Commerce Commission and the United States Department of Transportation. *Ace Doran Hauling & Rigging Company* v. *N.L.R.B.*, 462 F. 2d 190 (6th Cir. 1972); *N.L.R.B.* v. *Pony Trucking, Inc.*, 486 F. 2d 1039 (6th Cir. 1973); and its decision in the case at bar. Those decisions by the Sixth Circuit are in accord with the previous policy of the National Labor Relations Board insofar as they apply to single owner-drivers. See for example, *Indiana Refrigerator Lines*, 157 NLRB 539 (1966).

Contrary to those cases, however, the Board now holds that in situations similar to the instant case (and even in some weaker cases) single owner-drivers are independent contractors. This is true in both representation cases, *Fleet Transport Company, Inc.*, 196 NLRB No. 61 (1972); *Conley Motor Express, Inc.*, 197 NLRB No. 57 (1972); *Portage Transfer Company, Inc.*, 204 NLRB No. 117 (1973), and unfair labor practice cases, *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 208 NLRB No. 22 (1974). The Board made it clear in its latest decision on this point, *George Transfer & Rigging Co., Inc.*, 208 NLRB No. 25 (1974), that in its view owner-drivers are independent contractors and not employees, regardless of the I.C.C. and D.O.T. rules and regulations and other elements relied upon by the Court below and the Board in concluding that Thompson was an employee of the Company.

For some unexplained reason, neither the Court below nor the Board distinguished or even adverted

to the most recent Board cases cited above in holding against the Company in the case at bar. Nor did the Sixth Circuit or the Board mention that the Board had previously held the Company's owner-drivers to be independent contractors in *Cement Transport, Inc.*, 111 NLRB 175 (1955), under facts which, if anything, were more indicative of employee status than those in the present case.

This Court has not heretofore considered or passed upon the independent contractor status of owner-drivers, although the Court has decided other issues and cases which involved owner drivers. See *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO* v. *Oliver*, 358 U. S. 283 (1959), in which Mr. Justice Whittaker dissented on the basis that an owner-driver was an independent contractor, and *Golden State Bottling Company, Inc.* v. *N.L.R.B.*, —— U. S. ——, 38 L. Ed. 2d 388, 94 S. Ct. 414 (1973), where the Court held that a discriminatorily discharged employee was entitled to be reinstated as an independent contractor, but without discussing what constitutes an independent contractor.

However, in *United States* v. *Silk*, 331 U. S. 704 (1947), the Court held that owner-drivers were independent contractors insofar as the Social Security Act is concerned. Accord, *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (6th Cir. 1944). Under facts remarkably similar to those in the instant case, the Court found in the Silk Case that:

> ". . . *where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.* These driver-owners are small businessmen . . . It is the total situation, including *the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.*" (Our emphasis.)

In a similar vein, Congress has interpreted the terms "employee" and "independent contractor" as they are used in the National Labor Relations Act as follows:

> ". . . *'Employees' work for wages or salaries under direct supervision. 'Independent contractors'* undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and *depend for their income not upon wages, but* upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, *upon profits.*" (Our emphasis.)

1 Leg. Hist. Labor Man. Rel. Act 1947, page 309. See also, 2 Leg. Hist. Labor Man. Rel. Act 1947, page 1537.

As noted in the United Insurance Case, *supra,* Congress expressly excluded independent contractors from the coverage of the Act in 1947 in order to rectify the decision in *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U. S. 111 (1944), that common law principles of agency should not be used to determine who was an "employee" under the Act. However, in the Ace Doran, Pony

Trucking and Cement Transport Cases, *supra,* the Sixth Circuit has not actually applied the above quoted common law principles enunciated in the Silk Case and in the legislative history of the National Labor Relations Act, although it has given lip service to those principles.

In this connection, we submit the Sixth Circuit was wrong when it said that in this case "the Board chose between 'two fairly conflicting views' of the employee-independent contractor distinction." (Appendix A, page 4a.) The Board's decision is not only without support in the record considered as a whole, but it also is directly contrary to the Court and Board cases cited above which held owner-drivers to be independent contractors and not employees. The owner-drivers for the Company, including Thompson, unquestionably come within the purview of the definition of "independent contractors" established by Congress and by this Court.

Neither the Board nor the Court below gave any consideration to the profit-making potential of the owner-drivers in determining that they were not independent contractors. The only factor which the Board and the Court gave any weight to in deciding that the Company's owner-drivers are employees was the ICC and DOT regulations.

The question of the independent contractor status of owner-drivers under the National Labor Relations Act is extremely important to the entire country, as well as the trucking industry, as graphically demon-

strated by the recent nationwide work stoppage by independent owner-drivers. There are different methods to handle such work stoppages, depending upon whether the owner-drivers are considered to be independent contractors or employees. This makes the final resolution of that question a very urgent necessity.

The principal issue thus presented to this Court in this case is whether or not the rules and regulations of the Interstate Commerce Commission and the Department of Transportation make owner-drivers for interstate common carriers employees rather than independent contractors, where under common law principles they would otherwise obviously be independent contractors. There is a clear conflict of opinion on this point, and therefore this Court should formulate a decision on it which will serve to establish uniform standards on this question for the benefit of the trucking industry, the unions (principally the Teamsters Union) and the public. Otherwise, this question will remain the subject of continuing litigation before the Board and the Courts.

At the very least, the Company deserves an explication of why it is treated differently, on the same basic facts, from the carriers in the most recent Board cases mentioned above. *N.L.R.B.* v. *Metropolitan Life Insurance Company,* 380 U. S. 438 (1965). This is particularly true since the Board previously held the Company's owner-drivers to be independent contractors. *N.L.R.B.* v. *Groendyke Transport, Inc.,* 372 F. 2d 137 (10th Cir. 1967).

Thompson's False Accusations. The decisions of the Sixth Circuit and the Board on this point are not

supported by substantial evidence on the record considered as a whole. *Universal Camera Corporation* v. *N.L.R.B.*, 340 U. S. 474 (1951). The administrative law judge, the Board and the Court below all rendered their decisions on the basis that Thompson did in truth and in fact accuse the Company of bribing a union official, but they held that the Company nevertheless violated Section 8(a)(3) of the National Labor Relations Act by terminating Thompson's lease because of those false and slanderous allegations.

Such rulings are clearly contrary to the overwhelming weight of authority that employers can lawfully discharge union activists for making false or derogatory remarks about their employer. *N.L.R.B.* v. *Local No. 1229, International Brotherhood of Electrical Workers,* 346 U. S. 464 (1953); *Indiana Gear Works, Division of Buehler Corporation* v. *N.L.R.B.*, 371 F. 2d 273 (7th Cir. 1967); *Boaz Spinning Company* v. *N.L.R.B.*, 395 F. 2d 512 (5th Cir. 1968); *Great Dane Trailers, Inc.*, 204 NLRB No. 91 (1973). See particularly in this regard, *N.L.R.B.* v. *Howell Automatic Machine Company,* 454 F. 2d 1077 (6th Cir. 1972), and *Donovan d/b/a New Fairview Hall Convalescent Home,* 206 NLRB No. 108 (1973).

The fact that Thompson actually made the false bribery accusations distinguishes this case from *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U. S. 21 (1964). Furthermore, that case involved a violation of Section 8(a)(1) of the Act, and the Court expressly declined to rule on the application of Section 8(a)(3) to the case.

CONCLUSION.

We respectfully submit it is clear from the foregoing that the decisions of the Court below and the Board with respect to Thompson being an employee and being discharged for union activities were prejudicially erroneous. We further submit that those decisions are in conflict with previous Court and Board decisions and that this Court has not settled the important questions of Federal law here presented.

We therefore earnestly request that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES U. SMITH, JR.
LOUIS E. WOOLERY
Attorneys for the Petitioner

SMITH and SMITH
Louisville, Kentucky
Of Counsel.

APPENDIX

APPENDIX A.

Opinion and Decision of the United States Court of Appeals for the Sixth Circuit, which is reported at ____ F. 2d ____, 73 CCH Lab. Cas. ¶14,250 (1974).

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1260

NATIONAL LABOR RELATIONS BOARD, *Petitioner* v. CEMENT TRANSPORT, INC., *Respondent.*	On Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed January 22, 1974.

Before: CELEBREZZE and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

CELEBREZZE, J., delivered the opinion of the Court, in which MILLER, J., joined. O'SULLIVAN, J., (p. 10) dissented in part.

CELEBREZZE, Circuit Judge. The National Labor Relations Board petitions for enforcement of its Order of December 11, 1972, reported at 200 NLRB No. 122. In its Order and accompanying Decision, the Board adopted the Administrative Law Judge's conclusion that Respondent violated section 8(a)(1) and 8(a)(3) of the National Labor

Relations Act.[1] The Board ruled that the Company improperly interrogated its employees about their union sympathies before a representative election and illegally discharged Edgar Ray Thompson because of his organizational activities. It ordered Cement Transport to cease and desist from section 8(a)(1) and 8(a)(3) violations, to reinstate Thompson and make him whole, and to post appropriate notices.

Respondent contends that Thompson was an independent contractor, not an employee, that it committed no offense by questioning its drivers about their union leanings, and that Thompson was properly discharged for misconduct apart from his union activities. We turn first to the independent contractor issue.

Cement Transport, Inc., hauls cement for the Kosmos Portland Cement Company. While Cement Transport owns the trailers used in its business, it leases tractors from various individuals. Edgar Ray Thompson was one such lessor. A single owner-driver, Thompson had a standard lease with Respondent which provided that the tractor would be operated under the Company's direct supervision and control and "shall be devoted exclusively to the [Company's] business of transportation as much and as often as may be reasonably required by such business."

In *Ace Doran Hauling and Rigging Co.* v. *N.L.R.B.*, 462 F. 2d 190 (6th Cir. 1972), this Court held that in appropriate cases owner-drivers working for contract carriers could be considered employees rather than independent contractors, so that the Board had jurisdiction over single owner-

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[1] 29U.S.C. § 158: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157 of this title; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

drivers.[2] "The rationale behind our holding is based on both 'additional controls' and the control and supervision exercised pursuant to ICC requirements." 462 F. 2d at 194. *Ace Doran* was reaffirmed by this Court in *N.L.R.B.* v. *Pony Trucking, Inc.*, 486 F. 2d 1039 (6th Cir. 1973).

Cement Transport's operations are quite similar to those of Ace Doran, entailing both government-required supervision and additional controls. Cement Transport argues that *Ace Doran* can be distinguished because Doran paid for its drivers' cargo insurance (Respondent holds its drivers liable for stolen cargo), Doran got a percentage of revenues from its owner-drivers' backhauls (Respondent allows its owner-drivers to haul for others and keep the profit, but subjects them to recall at its behest), and Doran limited the routes its owner-drivers could take on deliveries (Respondent leaves the choice of roads to its drivers as a matter of practice but has the right to direct the routing.) Doran's discipline procedures may be more strict than Respondent's but they exist.[3]

While Respondent cites differences of fact, it has not shown differences of principle. Cement Transport has a sufficient *right to control* its single owner-drivers to sustain a finding that they are employees rather than independent contractors. It is the right to control, not its exercise, that determines an employee relationship, *N.L.R.B.* v. *A. S. Abell Co.*, 327 F. 2d 1, 4 (4th Cir. 1964); *N.L.R.B.* v. *Steinberg*, 182 F. 2d 850, 857 (5th Cir. 1950).

Our review of the Board's decision is limited. If substantial evidence in the record supports the Board's conclusion, this Court is bound by such findings, even though

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[2]Under Section 2(3) of the Act, "The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The Board has no jurisdiction over independent contractors.

[3]Once a driver signs in on the Company's maintained list, he is bound to haul any load assigned. Refusal to haul an assigned load results in a three-day suspension.

the Board chose between "two fairly conflicting views" of the employee-independent-contractor distinction. *N.L.R.B.* v. *United Insurance Co.*, 390 U. S. 254, 260 (1968). We find that the Board has done so in this case and affirm its conclusion on the basis of *Ace Doran.*[4]

Second, Respondent objects to the Board's finding that it violated Section 8(a)(1) of the Act by coercively interrogating its employees before a representative election. The record shows that shortly after the 1971 campaign to organize Respondent's drivers began, Respondent's general manager asked three employees on five separate occasions whether they had signed Union cards and whether Edgar Thompson was asking their help in his organizing efforts. He did not caution the employees that no retaliation would flow from their answers. The untruthful responses of two of the employees demonstrated their natural fears about such questioning. We agree that under the circumstances, the general manager's questioning constituted inherently coercive interference with the employees' right freely to choose a bargaining representative, under Section 8(a)(1) of the Act. See *N.L.R.B.* v. *Gissell Packing Co.*, 395 U.S. 575 (1969); *Capital Broadcasting Corp.* v. *N.L.R.B.*, 479 F. 2d 329 (6th Cir. 1973). Substantial evidence in the record considered as a whole supports the Board's conclusion on this point. *N.L.R.B.* v. *Armstrong Circuit, Inc.*, 462 F. 2d 355, 357 (6th Cir. 1972).

Third, Respondent argues that the Board erred in holding that the Company fired Thompson because of his union activities.

Our inquiry is whether substantial evidence in the record as a whole supports the Board's conclusion that Respondent discharged Thompson because of his Union ac-

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[4]Respondent's single owner drivers were found to be "employees" in two other N.L.R.B. decisions. *Cement Transport, Inc.*, 162 N.L.R.B. 1261 (1967); Regional Director's Decision and Direction of Election, Case No. 9-RC-9380, Mar. 22, 1972.

tivities. See *N.L.R.B.* v. *Ogle Protection Service, Inc.*, 375 F. 2d 497, 505 (6th Cir.), *cert. denied*, 389 U. S. 843 (1967); *cf. Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 488 (1951); 29 U.S.C. § 160(e). The question of discriminatory motivation under Section 8(a)(3) is primarily factual, to be determined initially by the Board through its administrative apparatus. *N.L.R.B.* v. *Murray Ohio Mfg. Co.*, 358 F. 2d 948, 950 (6th Cir. 1966); *N.L.R.B.* v. *Ogle Protection Service, Inc.*, 375 F. 2d 497, 505 (6th Cir. 1967). "The Board, not the Courts, has the delicate task of divining an employer's motives from the confusion generated when spirited organizational activity clashes with comparable efforts to eliminate it." *N.L.R.B.* v. *Lon de Young's Market Basket, Inc.*, 406 F. 2d 17, 21 (6th Cir.), *remanded on other grounds*, 395 U. S. 828 (1969).

The burden of proving an employer's discriminatory motive in discharging an employee is on the General Counsel. *N.L.R.B.* v. *Bangor Plastics, Inc.*, 392 F. 2d 772, 777 (6th Cir. 1967); *Lawson Milk Co.* v. *N.L.R.B.*, 317 F. 2d 756, 760 (6th Cir. 1963). The Board found that the General Counsel had met that burden. The record is clear that Respondent was aware of Thompson's spearheading the organization of its drivers since 1967 and that it actively opposed such efforts. One campaign was aborted in 1969, when Thompson discovered that the Company had found out how many Union cards were being turned over to Teamsters Louisville Local 89. To avoid another leak, Thompson turned to Local 299 for aid in the 1971 campaign.

By July 15, 1971, Thompson had collected 38 signed authorization cards, representing substantially all the drivers eligible to vote. Between that time and the petition for an election in January, 1972, Thompson was advised by union officials to hold the cards. To maintain union interest, he continued to voice dissatisfaction with the Company's wage scale and to complain about company practices after July 15.

On October 25, 1971, the Company terminated Thompson's lease. The Administrative Law Judge found that Respondent's President Cummins, in a phone conversation the day after terminating Thompson's lease, told Thompson that his discharge was prompted by Thompson's "spreading that Union poison around." Cummins testified,

> I've known this man for a long time. He has been a good operator. There is no question about that. There is no fault to find there but he really never has worked for anybody else for any length of time. I just feel like as far as the companies that are in this area are concerned, we are probably as good a company to work for as any company in the country but I don't think he felt that way and so I suggested to him that he go somewhere else and work awhile. Maybe he would see that things aren't quite so bad at home as he thought they were and I knew people in the trucking industry around here and if he wanted me to say a word for him, I would tell anybody he was a good operator. Then, maybe some day if he felt differently about it, if he didn't feel that we were such a bunch of thieves and liars, we might talk again.
> Tr. 424.

Accepting the credibility assessments of the Administrative Law Judge[5] and considering the evidence above and the rest of the record, we find substantial evidence to support the Board's conclusion that Thompson was discharged because of his union-related activities.

Ordinarily this would end our review. Respondent, however, has asserted what amounts to an affirmative de-

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[5]We will not normally disturb the credibility assessments of the Board or the Administrative Law Judge, who has observed the demeanor of the witnesses. *N.L.R.B.* v. *Stemun Mfg. Co.*, 423 F. 2d 737, 739 (6th Cir. 1970); *N.L.R.B.* v. *Howell Automatic Machine Co.*, 454 F. 2d 1077, 1079 (6th Cir. 1972).

fense.[6] It charges that, in conducting his activities, Thompson made numerous false and derogatory statements about the Company itself, the general manager, and the Company president. It points out that Chairman Miller dissented from the Board's decision, finding that Thompson had accused his employer of bribing union officials.

In considering this contention, we note that an employer's good faith in firing an employee engaged in protected activity is not a defense to a § 8(a)(1) violation.

> In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. *National Labor Relations Board* v. *Burnup & Sims,* 379 U. S. 21, 23 (1964).

Since Thompson was actively engaged in a protected activity, and his discharge was prompted by alleged acts of misconduct in the course of his organizing efforts, the only remaining question is whether Thompson was guilty of misconduct so outrageous as to justify his discharge in spite of his protected activities.

In the context of a struggle to organize a union, "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth," so long as the

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[6]The Company's assertion can be treated in one of two ways. First, it may be considered an argument that the "real reason" for discharging Thompson was his offensive actions, not his protected activity. Under this view, it is more an attack on the Board's conclusion (*discriminatory* discharge than an affirmative defense. Second, it may be analyzed as a *bona fide* affirmative defense (even assuming a prima facie violation, the company had the legal right to discharge him because of gross improprieties). Because of our affirmation of the Board's conclusion, we need not choose between these two characterizations or delve into the legal issues they raise.

allegedly offensive actions are directly related to activities protected by the Act and are not so egregious as to be considered indefensible. *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U. S. 53, 61 (1966); *N.L.R.B.* v. *Local 1229, Int'l. Brotherhood of Electrical Workers*, 346 U. S. 464 (1953); *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U. S. 9, 17 (1962). See also *Hugh H. Wilson Corp.* v. *N.L.R.B.*, 414 F. 2d 1345, 1355-56 (3rd Cir. 1969); *Crown Central Petroleum Corp.* v. *N.L.R.B.*, 430 F. 2d 724, 731 (5th Cir. 1970); *N.L.R.B.* v. *Thor Power Tool Co.*, 351 F. 2d 584, 587 (7th Cir. 1965).

Under this standard, we cannot find that Thompson's advocacy of a "return to 65%," which concerned a higher compensation scheme Thompson believed the Company had taken from the drivers years ago, was indefensible or reckless, even if the 65% scheme never existed. We accept the Administrative Law Judge's credibility determination that Thompson believed the 65% scheme was once in effect, even though this may have been a false belief. Similarly, we cannot find Thompson's reference to Respondent's President as a "son-of-a-bitch" to be egregious or out of context in a labor struggle. See *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U. S. at 60-61.[7]. Nor do we find anything improper about Thompson's securing a copy of the Company's intrastate tariffs from the Kentucky Department of Motor Transportation. There is testimony in the record that in requesting a copy of the rates,

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[7]Profanity in labor disputes has been excused in many cases. *Falcon Plastics-Division of B-D Laboratories, Inc.* v. *N.L.R.B.*, 397 F. 2d 965 (9th Cir. 1968); *Hugh M. Wilson Corp.* v. *N.L.R.B.*, 414 F. 2d 1345, 1355-56 (3rd Cir. 1969); *Crown Central Petroleum Corp.* v. *N.L.R.B.*, 430 F. 2d 724, 731 (5th Cir. 1970). In *N.L.R.B.* v. *Thor Power Tool Co.*, 351 F. 2d 584 (7th Cir. 1965), for instance, an employer fired an employee after he had participated in a grievance session and had muttered "horse's ass" as he walked out the door. The Court found that this "remark furnished the excuse rather than the reason for the [employer's] retaliatory action." 351 F. 2d at 587.

Thompson told a state official that he had been unable to obtain a copy from the Company and that he knew this was not true. Even assuming that Thompson had told a falsehood, the utterance of such an isolated and non-prejudicial remark could not justify his discharge. Yet, Respondent states that Thompson's going to the Kentucky Department was the "the straw that broke the camel's back," the incident which immediately provoked the termination of his lease. We reject the implication of Respondent's argument that an employee should fear asking a state official for public information about his Company. We find no disloyalty or insubordination in such an act.

Respondent's two remaining arguments concern an alleged threat and an accusation that a company official was bribing the union.

Several witnesses stated that Thompson had told them that he had helped build the company up and "he was going to help tear it down." If Thompson's alleged statements were actually made and if they amounted to an improper threat against the Company, the Company might have been justified in discharging him. *N.L.R.B.* v. *Local 1229*, 346 U. S. at 476. A close reading of the record, however, reveals that the "threat," even if made, should be considered a protected statement. The Company's witnesses stated that Thompson said he would "tear the Company down" only "if he didn't get what was coming to him."

The thrust of the threat was similar to that of a strike—that an employee will take appropriate action if the Company is not forthcoming on the employee's demands. Such a threat is at the very heart of labor-management relationship. Thompson's expressed means of "tearing the Company down," according to the testimony of the Company witnesses, would have been to complain to the U. S. Department of Transportation and the ICC about violations of safety and other regulations and take similar steps within

an employee's rights. Thus, considering the entire context in which Thompson made his comments, we cannot find them to be recklessly malicious, insubordinate, or unrelated to his protected activity. The Company labels Thompson's campaign a "personal vendetta." The Board found them to be one man's effort to organize a union. Even if we were to come to a different conclusion after a trial *de novo* before us, we cannot disagree with the Board's assessment after reviewing the entire record. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. at 488; *Capital Broadcasting Corp.* v. *N.L.R.B.*, 479 F. 2d 329, 330 (6th Cir. 1973).

Finally, the Company argues that Thompson's discharge was justified because, as Chairman Miller wrote in dissent, Thompson had circulated a "totally baseless rumor that his employer has been bribing a union official at the rate of $20,000 a year." Thompson denies making any such comment. Witnesses for the Company charge that he did. The Administrative Law Judge made no specific finding of fact as to whether Thompson actually started such a rumor.

The Board's majority accepted the Administrative Law Judge's explanation that Thompson had reason to suspect Company-Local 89 collaboration, since the Company had quickly found out the number of union cards obtained in 1969, when Thompson had tried to organize a unit under Local 89's auspices. Given this circumstance, we must agree that the rumor about Local 89-Company collusion was not "totally baseless." Whatever the specific allegations may have been about a "bribe," even assuming that Thompson made them, they are among those matters best left to charge and counter-charge, with eventual resolution by the vote at a representative election. See *N.L.R.B.* v. *Ben Pekin Corp.*, 452 F. 2d 205 (7th Cir. 1971). The accused party, of course, has recourse to private tort action, *Linn* v. *United Plant Guard Workers*, 383 U. S. 53.

Finding no activity which could have separately justified Thompson's discharge in the context of an organizational drive, we affirm the Board's conclusion that Thompson's discharge was a violation of Section 8(a)(3) and (1) of the Act.. The Board's order will be enforced.

O'SULLIVAN, Senior Circuit Judge, dissenting in part.

I respectfully dissent from my brothers' affirmance of the Board's command that employee Johnson be reinstated with full back pay. I cannot believe that an employer is required to retain, or to restore to his payroll, a man who has given wide circulation to a story that such employer had avoided unionization by another union by a "payoff" of $20,000 a year to the President of that union. I share the relevant view of the Chairman of the NLRB.

APPENDIX B.

Decisions of the National Labor Relations Board and its Administrative Law Judge, which are reported at 200 NLRB No. 122 (1972).

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

CEMENT TRANSPORT, INC. and EDGAR RAY THOMPSON, an Individual	Case 9-CA-6569

DECISION AND ORDER

On June 15, 1972, Administrative Law Judge[1] Thomas F. Maher issued the attached Decision in this proceeding. Thereafter, Repondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided

[1]The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

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[2]The Respondent essentially seeks to have the Board reverse the Administrative Law Judge's credibility resolutions, particularly his crediting of Thompson's testimony that Respondent's president told him immediately after his discharge that he was being let go because of the "union poison" he was spreading around. Absent a showing by a clear preponderance of all of the relevant evidence that these credibility resolutions are incorrect, the Board will not overrule an Administrative Law Judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3). Having carefully examined the record, we find no basis for reversing his findings. We would note that Thompson was a capable driver and that he was aggressive in his union activity to achieve benefits he thought he and his fellow employees were entitled to receive. Respondent's unequivocal discharge of him for these activities cannot now be justified on the ground that Thompson's activities may have provided Respondent with another basis for his discharge. The Board's problem in such cases is to determine not whether a good reason existed for the discharge, but whether that was the real reason, and if not, whether the real reason concerned the employee's union activity (or lack thereof). Our dissenting colleague seems to have stopped his inquiry at the point where he found a cause other than union activity existed which would have justified the discharge.

As a secondary consideration, however, we note that our dissenting colleague's characterization of the rumor allegedly instigated and circulated by Thompson as "totally baseless" is contrary to both the record and the Administrative Law Judge's findings. In discussing the Respondent's contention that it had been slandered by Thompson's accusation that it bribed a union official the Administrative Law Judge found:

> . . . Whatever language was used to describe the arrangement, if any, between Respondent and Business Agent Fisher of Local 89, the fact stands unrefuted by the evidence that the last time Local 89 officials provided blank authorization cards to the organizers General Manager Epps knew of it and of the number of cards involved before the drivers did. I can attach no other interpretation to Epps' failure to deny this incident attributed to him but to accept it as a fact.

Again, we have no basis for reversing this finding, particularly when the credited evidence was not denied; on the other hand, however, we are unable to discern, in view of this finding, how our dissenting colleague can characterize Thompson's alleged accusations as a "totally baseless rumor."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Cement Transport, Inc., Kosmosdale, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D. C., December 11, 1972.

John H. Fanning, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

CHAIRMAN MILLER, dissenting:

Is an employee who, among his other misdeeds, deliberately instigates and circulates a totally baseless rumor that his employer has been bribing a union official at the rate of $20,000 a year entitled to remain in the employ of the Company?

My colleagues apparently think so, and herein order such an employee reinstated with full backpay.

I think otherwise, and would dismiss the complaint.

Dated, Washington, D. C., December 11, 1972.

Edward B. Miller, Chairman
National Labor Relations Board

United States of America

Before the

NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

CEMENT TRANSPORT, INC.

and

EDGAR RAY THOMPSON, An Individual

} Case No. 9-CA-6569

Cassius B. Gravitt, Esq., and *Wayne E. Natale, Esq.*, of Cincinanti, Ohio, for the General Counsel.

James V. Smith, Esq., and *Louis E. Woolery, Esq.*, of Louisville, Ky., for the Respondent.

Mr. Edgar Ray Thompson, pro se.

TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS F. MAHER, Trial Examiner: Upon a charge filed by Edgar Ray Thompson on November 2, 1971 against Cement Transport, Inc., Respondent herein, the Regional Director for the Ninth Region of the National Labor Relations Board, herein called the Board, issued a Complaint on behalf of the General Counsel of the Board on December 23,

1971, wherein it was alleged that Respondent had violated Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act. In its duly filed Answer Respondent, while admitting certain allegations of the Complaint, denied the commission of any unfair labor practice.

Pursuant to notice a trial was held before me in Louisville, Kentucky, where all parties were present, represented by counsel, and afforded a full opportunity to present evidence, cross-examine witnesses, present oral argument and file briefs with me. Briefs were filed on April 29, 1972.

Subsequent to the issuance of the Complaint in this matter a petition was filed with the Regional Director on January 3, 1972, in Case No. 9-RC-9380 for an election among Respondent's truckdrivers to determine the representative status of Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Upon representations of Respondents that the substance of the instant proceedings, the alleged independent contractors status of the members of the bargaining unit, had a direct relation to the employee status of the alleged discriminatee herein, Edgar Ray Thompson, I granted Respondent's motion to incorporate into the instant proceeding the entire record in the pending representation case, Case No. 9-RC-9380, including the transcript and all exhibits. On March 22, 1972 the Regional Director issued his Decision and Direction of Election in Case No. 9-RC-9380 and I likewise incorporate this document into the instant proceeding and have attached the copy of it as Appendix A to this Decision.[1]

Upon consideration of the entire record, including the record and decision in Case No. 9-RC-9380, and the briefs

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[1]Cf. *The Herald Co.*, 181 NLRB 421, 424, fn. 7, enfd. 444 F. 2d 430 (C.A. 2) cert. denied 404 U. S. 990.

filed with me, and specifically upon my observation of each witness appearing before me,[2] I make the following:

Findings of Fact and Conclusions of Law

I. The Business of the Respondent

Cement Transport, Inc., Respondent herein, is a Kentucky corporation with its terminal in Kosmosdale, Kentucky, where it is engaged in the transportation of cement pursuant to a hauling agreement with the Kosmos Portland Cement Company. On January 27, 1967 the Board found, upon facts presented to it, that Respondent was an em ployer engaged in commerce within the meaning of the Act.[3] As nothing has been brought to the instant record that would suggest facts or circumstances relating to Respondent's business inconsistent with the Board's findings I accordingly conclude and find that Respondent continues to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, referred to herein as the Union, or the Teamsters, is admitted to be and I accordingly conclude and find it to be a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Sequence of Events*

For over 17 years, since May 1954, Edgar Ray Thompson has been a driver for Respondent under the terms of a lease agreement whereby Thompson and his truck-trailer are engaged exclusively in the transportation of cement products under the direction of Respondent's officials. The

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[2] *Bishop and Malco, Inc.*, 159 NLRB 1159, 1161.
[3] 162 NLRB 1261.

precise status of Thompson, as either employee or independent contractor, will be considered hereinafter (*infra* p. 8) and is not directly relevant to the chain of events which culminated in Respondent's termination of Thompson's lease agreement on October 25, 1971.

Since at least 1966 Thompson has actively sought the organization of Respondent's driver-owners, soliciting union memberships, discussing union matters frequently with his fellow drivers and, at a Board-conducted election, serving as an official observer for the Union. There is no question that all of this was known to Respondent's officials, and particularly to President T. W. Cummins, Jr., and General Manager William M. Epps, both of whom readily admitted to their knowledge of Thompson's activities.

Thompson's most recent efforts to unionize the drivers commenced in June 1971 when, in the company of four or five other drivers,[4] he drove to Greenwood, Indiana, and met with International Representative Donald Davis, assigned to Local 299 of the Teamsters, located in Detroit, Michigan. Davis gave Thompson a supply of blank authorization cards bearing the inscription of Local 299, instructed him to hold them, when signed, until the fall. These cards, when signed, were eventually returned to Davis who in turn gave them to International Representative Leon Carrier of Local 89, in Louisville. Because the use of cards supplied by Davis bore the inscription of the Detroit Local an issue has been raised as to Thompson's selection of a so-called "tough" union to represent the drivers and deal with Respondent. Thompson testified without contradiction that when blank authorization cards were obtained from a representative of Local 89 in 1969 in preparation for an organizing campaign and "before we got our cards signed Mr. Epps told us how many cards

[4]Employee Bobby Melson included himself and Employees Sales and Burgess in this group.

we done picked up."[5] As a consequence no effort was made at that time to continue with the organizing campaign. It was to avoid a recurrence of this, I conclude, that prompted Thompson and his associates to travel to Greenwood, Indiana, to obtain blank cards in June 1971 rather than to get them from the Louisville local.[6] That the cards were, in fact, turned over to Union Representative Carrier of Local 89 by Davis after they had been signed and given to him by Thompson satisfies me that going outside the Louisville area to obtain a "suitable" labor organization was not intended. Nor am I aware of any vice in doing so, had the employees so preferred.

During the remainder of June and into July Thompson solicited each driver for membership in the Union and testified that by July 15[7] he had obtained 38 signed authorization cards,[8] which appears to constitute substantially all of the drivers eligible to vote.[9] Consequently, from that date organizing activity necessarily subsided, Thompson being under instructions from Union Representative Davis to hold on to the cards until the fall. The cards were not, in fact, used until they were presented to the Regional Director on January 3, 1972, as the supporting evidence of employee interest required upon the filing of the petition in Case No. 9-RC-9380.

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[5]Epps did not deny this conduct attributed to him.

[6]I do not accept Thompson's confused explanation that he considered Davis the better union official to work with.

[7]Unless stated otherwise all dates refer to events in 1971.

[8]Employee Randolph Wood credibly collaborates this figure as having been told him by Thompson.

[9]Twenty-four drivers voted in the 1967 election; the petition in Case No. 9-RC-9380, now pending, stated that there are approximately 37 employees in the unit in which an election is being sought. Because the Regional Director's decision (Appendix A) differentiates as to eligibility between driver-owners and multiple driver-owners and because the 38 card signers were not identified in the record the precise number of drivers eligible to vote cannot be stated at this point, nor is it significant to any issue herein.

Meanwhile, as Thompon's campaign gained momentum Respondent developed an interest in it. Thus on June 17 General Manager Epps engaged Employee Leonard Kilgore in a conversation asking if Thompson had asked him to sign a union card, stating that he had heard Thompson had some and was passing them out. Several days after Kilgore had signed his Union card Epps again asked him if he had signed a card. A week or two later, after Kilgore had been seen leaving Thompson's company, Epps asked him if they had talked about the Union and if Thompson has asked him yet to sign a union card.[10]

Similarly, at some unrecalled dates prior to Thompson's departure and while he was still soliciting Union authorization cards Thompson solicited Employee Lyndell Small, giving him a card to sign.[11] While the card was still in Small's possession Epps approached him and asked him if he had signed a card. Small answered equivocally and Epps agreed that he had a right to do as he pleased. In the course of the conversation Epps said it had been reported to him that Thompson was passing out cards and asking for help.

Employee Earl McMahan also had a conversation with Epps relating to Union cards and to Thompson. Thus in September Epps asked him if there were any cards being passed out, referring to Thompson by name. McMahan "kind of smudged it off," saying that he did not know too much about it. Actually, however, Thompson had solicited and obtained McMahan's membership into the Union and

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[10]The credited tsetimony of Employee Kilgore. Epps, while admitting to the conversations with Kilgore, denies that he asked him if he had signed a card or if Thompson was passing them out, stating that he had no reason to ask the questions because he already knew. Upon my observation of Epps as a witness I do not credit his testimony except as it relates to facts within his peculiar knowledge or constitutes statements contrary to his or Respondent's interest.

[11]Small's card was signed on July 1.

McMahan, when asked at the hearing what reason Thompson had given him for joining the Union, stated that "it would benefit us all if we did"—"generally, it was money wise."

Meanwhile, after learning of Thompson's progress in organizing the drivers, Epps reported the situation to President Cummins who immediately sent a letter, under date of July 1, to each driver. He called attention of the men to the organizing campaign then in progress and gave his reasons why it was "the worse possible thing that could happen to Cement Transport and the men who drive for us."[12] Strongly urging the drivers not to sign authorization cards being circulated among them Cummins suggested a personal motive on the part of "those getting you to sign up," and pointed out the financial benefits and friendly relationship with the management which they already emjoyed. He then outlined the generous character of the rates being paid the men and the disadvantages suffered by drivers working elsewhere under union contracts. Ending with his assurance of possible rate improvement Cummins again urged the men to refuse to sign an authorization card.

By July 15, according to Thompson, practically all the drivers had signed cards. After that date union activity naturally tapered off, and everyone so testified. Thompson, under instructions not to turn in the cards until fall did maintain a modicum of union interest, frequently discussing with the drivers their inadequate compensation and telling everyone who would listen to him of the arrangement he had worked under when he began driving for Respondent 17 years ago—namely, the provision in his first contract allocating to him 65 percent of the revenue derived from each run driven.

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[12]It is not alleged that this communication violated the Act.

It was on this issue that Respondent based one of its several charges of deliberate misrepresentation by Thompson, hence a study of the background would be in order. Respondent denied Thompson's contention that an appendix to the 1954 lease agreement with him contained such a provision and it introduced into evidence the purported document. Thompson identified the contract portions of the document but insisted that the appendix upon which the alleged 65 percent was specified had been removed. It was his testimony that an entirely different appendix, one containing a zone system of rating which is presently in use, had been substituted. Respondent's general bookkeeper and accountant, employed at the time, testified in contradiction to this, stating that there had been no substitution of pages in the original document and that in fact, 65 percent of gross revenue was never paid to drivers. I can only deduce from this inconclusive evidence that Thompson did, in fact, labor under the impression that his first lease called for 65 percent of gross revenue and that he has consistently been agitating among the men to return to what he believed was the original rate. Under all the circumstances present here, irrespective of whether or not the original lease was as Thompson described it to the men and to me on the witness stand, I am persuaded that he did believe the original lease to be as he states it and that he had acted and spoken in accordance with his belief, mistaken though he may have been.

In further support of his efforts to generate opposition to the existing pay rates among the drivers Thompson in early October went to the offices of the State Motor Transport Division in Frankfort, Kentucky, and obtained copies of the rates and tariffs under which Respondent operated in the transportation of cement. Thompson had these rates duplicated and gave copies to all the drivers. Meanwhile, he maintained a constant barrage of propaganda directed

to the existing pay scale and his determination to improve it.

After a period of continuing activity among the men by Thompson Respondent's President Cummins, on October 25, wrote him a letter terminating his lease. In a telephone conversation on the following day Cummins, by his own testimony, stated, as follows:

> He identified himself and wanted to know if I was the one that signed the letter terminating his agreement and I said I was and he said, why and I said because we simply could not tolerate the turmoil you were creating out there and the poison you were spreading out among our people. It just got to the point where—I was sorry that I had to release him because he had been there quite a long while. It didn't make me feel very good to have to do that and I was sorry but really I had no alternative. He was destroying the authority of my superintendent and I could not continue to let him do those things. Tr. 422

In his, testimony before me Thompson had stated that Cummins had accused him of "spreading that Union poison around," whereas Cummins testified that in his accusation he had referred to the activity as "the poison you were spreading out among our people." Thus he did not include the word "Union" in his account, and he specifically contradicted Thompson's testimony that he did. I accept Thompson's testimony as to the use of the term "Union poison" and reject Cummins' denial as being contradicted by the remainder of his account of the conversation wherein the word "Union" *was* used at several points. Thus when asked if he did "ever allude to the Union in the conversation," Cummins replied:

> I don't recall that I did. I told him that I was certainly aware of his activities out there in June. I

knew that. I said, I hope I thought it was all over; I knew that you weren't able to get a Union organized out there and I wondered why he did it and he said he was trying to make things better for himself and the men and I said, well, why didn't you come and talk to me if you had some problems. You never did approach me about any of these things. He said, well why didn't you come and talk to me. Well, I wasn't the instigator in the case. If he had a problem and he was going to get somebody else to solve his problems, I might have solved them for him pretty quickly but I never even knew what they were. So that was his answer and then we went into a lot of other things, just merely repetitious, you might say. Tr. 423

And by way of seeking to mollify the effects of his action Cummins then provided to Thompson (and the record) his final explanation thus:

I've known this man for a long time. He has been a good operator. There is no question about that. There is no fault to find there but he really never has worked for anybody else for any length of time. I just feel like as far as the companies that are in this area are concerned, we are probably as good a company to work for as any company in the country but I don't think he felt that way and so I suggested to him that he go somewhere else and work awhile. Maybe he would see that things aren't quite so bad at home as he thought they were and I knew people in the trucking industry around here and if he wanted me to say a word for him, I would tell anybody he was a good operator. Then, maybe some day if he felt differently about it, if he didn't feel that we were such a bunch of thieves and liars, we might talk again. Tr. 424

Thompson has not since driven for Respondent.

B. *The Disputed Employee Status of the Drivers*

It is Respondent's contention that its drivers, including Thompson, are independent contractors and not employees protected by the Act. Upon this premise, it is contended, the termination of Thompson's lease agreement did not constitute a discrimination remediable by the Act against him, as an employee.

This issue is not a new one. It was raised by Respondent in the context of an employee representation proceeding in 1966. There the Board decided, on January 27, 1967, in *Cement Transport Inc.*, 162 NLRB 1261, that the identical class of employees involved here were employees within the meaning of the Act, and designated the following as a unit of employees appropriate for the purposes of collective bargaining:

> All single owner-driver and nonowner-drivers employed by the Employer at its plant located at Kosmosdale, Kentucky, but excluding all office clercial employees, guards, professional employees and supervisors as defined in the Act.

Subsequently, on March 22, 1972, while this proceeding was before me the Regional Director, in Case No. 9-RC-9380, issued his Decision and Direction of Election in which, in accordance with the earlier Board Decision, he found single owner-drivers and nonowner-drivers to be employees, and directed an election in the same bargaining unit designated by the Board in its January 1967 Decision. Upon the authority of these determinations as they relate directly to the Respondent's denial of Edgar Ray Thompson's employee status, which status has been fully litigated, and in the absence of any evidence not previously considered or available that would alter the final determination of this employee status, I consider myself precluded from relitigat-

ing this issue in a directly related complaint case, and accordingly conclude and find upon these respective Board and Regional Director determinations that Edgar Ray Thompson, a conceded single owner-driver under lease agreement with the Respondent, is an employee within the meaning of the Act.[13]

C. *Respondent's Defense*

Quite apart from its basic contention that Thompson is an independent contractor and not an employee subject to the Act, an issue resolved above, it is Respondent's further contention that Thompson's lease was terminated for cause and for engaging in concerted activity *not* protected by Section 7 of the Act. Thus throughout the hearing it was claimed and it is supported by evidence that Thompson had on numerous occasions transported unauthorized individuals in his cab, and that he had incurred accidents in which he was found by the Company to have been at least partially responsible, and that these contributed to Respondent's decision to terminate Thompson's lease. In its brief to me, however, Respondent appears to have abandoned these factors as being contributory to the termination. Thus in commenting upon the pretexts it could have used on earlier occasions to terminate Thompson Respondent refers to the unauthorized driver incidents and Thompson's two accidents and states that these "certainly would have provided ample opportunity and excuse for cutting him off on a number of occasions after the 1967 election." Having thus disavowed these past and recent peculations as the motive, or partial motive, for the lease termination Respondent's brief proceeds to cite other and

[13] *The Herald Company*, 181 NLRB 421, enfd. 444 F. 2d 430 (C.A. 2), cert. denied 404 U. S. 990; *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 333 U. S. 146, 162; *N.L.R.B.* v. *Sagamore Shirt Co.*, 365 F. 2d 898 (C.A., D.C.); *N.L.R.B.* v. *Union Brothers Inc.*, 403 F. 2d 883, 887 (C.A. 4).

more recent activity for what it contends to be "Reasons for Thompson's Termination." Accordingly, therefore, in contemplation of Respondent's own assessment of the basis for Thompson's termination I reject as not relevant to any issue here such facts as deal with Thompson's travelling companions or his several minor accidents in the recent past, *albiet* his overall truck driving record with Respondent has been favorably recognized by it, and others, through numerous safe driver awards and the winning of the State Championship in the National Truck Rodeo.

There remains to be stated then the reasons advanced by Thompson for the lease termination. Here it is claimed that Thompson, in reprisal for being charged in June 1971 for the loss of two batteries by Respondent, determined that he would organize the drivers; that he had obtained signed authorization cards from other drivers through threats of loss of jobs and seniority if they did not sign up forthwith that he conducted a personal campaign of abuse, vilification and slander of the Company by stating to other drivers that he had been cheated out of his pay and that the Company had bribed an official of Local 89, Dick Fisher; that he had stated on numerous occasions he had helped build up the Company and that he was going to help tear it down, referring to President Cummins as a "son-of-a-bitch"; that in the course of all of the foregoing he had created such a disturbance as to get the drivers upset and reduce their morale; and finally that by going to the State Motor Transport Division and obtaining a copy of the Company's tariff rates on file there Thompson, stating that he could not obtain them from the Company, misrepresented the Respondent to the State officials, and sought to "defame and discredit" it by conducting a one man campaign among the drivers showing them how they were being cheated out of money, using his first lease agreement as he recollected it (*supra*, p. 6) as the basis of comparison.

For all of the foregoing Respondent claims that Thompson's activity was not protected by Section 7 of the Act and it was accordingly provided with a complete defense of its termination of his lease agreement, if he were found to be an employee and not an independent contractor, as basically claimed.

C. *Discussion, Analysis and Conclusions*

Respondent's characterization of Thompson's activity misreads, in many instances, the evidence in the record, and in other instances it manifests a lack of understanding of the representation processes guaranteed by the Act. For example, it is suggested throughout the record that something devious was being perpetrated by Thompson and a group of drivers who sought a particular labor organization to represent them—the "tough" Detroit Teamsters Local. Quite apart from the fact that the International Represenative of that so-called "tough" local actually turned the signed authorization cards over to the Louisville, Local 89, there is nothing in the administration of the Act that requires employees to chose only certain labor organizations, and then on a geographic basis. The very purpose of the Act is otherwise. Indeed the unrefuted statement of Thompson that a supply of authorization cards from some source other than Local 89 was sought out to insure that a premature "leak" of their plans would not again occur would provide in itself, ample justification for looking elsewhere for cards, as the men did. And it also puts to rest Respondent's accusations concerning the so-called "bribe" of the Union official. Whatever language was used to describe the arrangement, if any, between Respondent and Business Agent Fisher of Local 89, the fact stands unrefuted by the evidence that the last time Local 89 officials provided blank authorization cards to the organizers General Manager Epps knew of it and of the number of cards in-

volved before the drivers did. I can attach no other interpretation to Epps' failure to deny this incident attributed to him but to accept it as a fact.[14]

So much then for Thompson's supposedly single-handed selection of a union and the so-called slander respecting the "bribing" of a union official. The remainder of Respondent's accusations directed at Thompson are equally without significance. Thus, the fact that the campaign had quieted down by mid-July only to be rejuvinated thereafter by Thompson is claimed by Respondent to have some hidden malevolence. The campaign did quiet down, to use Respondent's terminology, when Thompson obtained the signed card of practically of every eligible driver. Nothing remained to be accomplished but the winning of the election, and Thompson credibly testified that he was under instructions from the Union's international representative, Davis, to wait until fall—at which time, it must be remembered, the cards would then serve the purpose of establishing a basis for a petition for an election. This actually occurred in January 1972. Meanwhile, Thompson's only campaign chores were to maintain an interest in the Union pending the coming election. And it is precisely this which the Respondent misconceives as defamation, accusation of cheating (a word credibly rejected by Thompson as never having been used), abuse, vilification, and threats to tear down the Company. Indeed Respondent objects not only to the campaign which Thompson carried on in behalf of the Union but to the effect of it as well; the disturbance, the fears being engendered among the drivers, and their general state of unrest.

Essentially it is Respondent's contention that unless an employee engages in union or concerted activity with a degree of finesse and gentility then he has divested him-

[14] See *Ben Pepin Corp.*, 181 NLRB 1025.

self of the protections of Section 7 of the Act.[15] Thus it seeks to convert protected concerted activity into conduct which would warrant termination by characterizing it as a disturbance. Thompson did frequently criticize the Respondent, referring to the 65 percent of gross revenue which he believed he had received in his first lease agreement, and he did circulate among the drivers copies of the Company's tariff rates filed with the State as a means of comparing the Company's income on a trip by trip basis with the amount paid to each driver for such trip. And on occasion he did threaten to report the Company's alleged permissiveness in certain operating areas to State Motor Vehicle Division and the Interstate Commerce Commission. This activity may well have engendered a degree of unrest and general dissatisfaction. But such unrest or dissatisfaction often proceeds or accompanies certain concerted activity for mutual aid or protection; indeed concerted activity often springs from the employees' dissatisfaction with their working conditions. If an employer were free to discharge an employee who, in the exercise of the statutory rights, sought to induce concerted activity (here the eventual selection of the Union to represent them) simply by characterizing that exercise as "disturbance" or the other invective used by the Respondent, the guarantees which the act extends to concerted activity for mutual aid and protection would be largely nullified. A strike, for example, is a classic example of unrest and dissatisfaction among employees, and the language of the pickets and the picket signs are no less the variety of accusations used by Thompson throughout this campaign. But it cannot be accepted that employees who seek to persuade fellow employees to engage in such concerted activity (here acceptance of the Union in the coming election) are engaged in a disturbance, and are

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[15]Section 7 provides in relevant part that "Employees shall engage in . . . concerted activities for the purpose of . . . mutual aid and protection."

therefore beyond statutory protection.[16] Nor is it material that Respondent may have, in good faith, regarded Thompson's conduct as falling outside the scope of protected activity. Whatever Respondent's motive for terminating Thompson's lease it did so as he was engaged in the exercise of his right "to form, join or assist labor organizations." Because anti-union bias is not necessary for an employer to infringe upon such rights Respondent's good faith reliance upon the righteousness of his action is no concern.[17]

In sum, the totality of Thompson's activities to which Respondent objects constitutes nothing more than a vigorous, continuing organization campaign which, even as this decision is written awaits an election among the drivers.[18] Thompson has at all times focused the attention of the drivers on what he believed to have been his initial pay rate and upon the disparities between that rate, the rates they were presently being paid, and the income which the Respondent receives. This matter goes to the very heart of working conditions. Similarly, assuming that he did criticize Respondent for its private dealings with an official of the Union, this matter, not denied anywhere in the record, concerned advance knowledge of employee activity. If ever employees are subject to unlawful interference it would be at the outset of a campaign. Respondent can hardly be heard to complain that its undenied interference was beyond reproach.

Finding, therefore, that Thompson's activities were protected in nature I am not disposed to conclude that they have lost this protection simply because he failed to comport with Respondent's standards of behavior. The Board

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[16] *Salt River Valley Water Users Association* v. *N.L.R.B.*, 209 F. 2d 335 (C.A. 9).

[17] *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U. S. 21.

[18] Case No. 9-CA-6569.

does not impose such a heavy hand upon the conduct of employee organization and representation.[19]

Elsewhere I have found and concluded upon established authority (*supra*, p. 8) Respondent's single owner-drivers, of which Edgar Ray Thompson was one, are employees within the meaning of the Act. In such circumstances, therefore, upon the facts set forth above I conclude and find that by the termination of the lease agreement of Thompson for the reasons stated Respondent thereby discriminated against him as an employee for engaging in concerted and union activities protected by Section 7 of the Act, and thereby violated Section 8(a)(3). By the same conduct and by Epps' interrogation of Employees Kilgore, Small and McMahan concerning Thompson's union activities and their own sentiments and membership (*supra*, pp. 3-4), I further conclude and find that Respondent thereby interfered with, restrained and coerced Thompson and its other employees in the exercise of their statutory right in violation of Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with the Respondent's operations described in Section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States, and tend to leas to labor disputes threatening and obstructing commerce and the free flow of commerce.

V. The Remedy

I have found that Respondent has interfered with, restrained and coerced its employees in certain respects and that it has discriminatorily terminated the lease of Edgar

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[19] *M S Plastics of Ohio*, 181 NLRB 705, 707-708; *New York Trap Rock Corp.*, 148 NLRB 374, 380.

Ray Thompson. I shall recommend that Respondent cease and desist from this conduct, and because the nature of the unfair labor practices committed here are of such gravity as to present a threat of future violations of the Act, I shall recommend that Respondent cease and desist from any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights.

Affirmatively I shall recommend that Respondent reinstate the most recent agreement between itself and Edgar Ray Thompson with backpay to be computed in the customary manner,[20] with interest at the rate of 6 percent per annum,[21] that it preserve and upon request make available to the Board or its agents for examination and copying all of its payroll records, timecards, personnel records and reports and all other records necessary to determine the amount of backpay due, and that it post an appropriate notice of compliance with such order as the Board issues. Upon the foregoing findings of fact, conclusions of law and the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

Respondent's Cement Transport, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating its employees concerning their membership in and activity in behalf of Local Union

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[20] *F. W. Woolworth Co.*, 90 NLRB 289.

[21] *Isis Plumbing & Heating Co.*, 138 NLRB 716.

[22] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

No. 89, International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, or any other labor organization.

(b) By terminating their lease agreements, discharging, or otherwise denying employment to any employee or in any other manner discriminating against any employee with respect to hire, tenure of employment, or any term or condition of employment.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which it is deemed will effectuate the policies of the Act.

(a) Offer to Edgar Ray Thompson the reinstatement of his most recent lease agreement.

(b) Make whole Edgar Ray Thompson for any loss of income suffered as a result of the discrimination against him in the manner set forth in "The Remedy."

(c) Post at its Kosmosdale, Kentucky, plant a notice attached hereto as "Appendix B."[23] Copies of the notice on forms provided by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent be posted immediately upon receipt thereof in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

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[23]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the said Regional Director in writing within 20 days from the receipt of the Trial Examiner's Decision what steps it has taken to comply herewith.[24]

Dated at Washington, D. C.

(s) Thomas F. Maher
Trial Examiner

[24]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region Nine, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Form NLRB-4477
(11-63)

APPENDIX A

United States of America

Before the

NATIONAL LABOR RELATIONS BOARD

Cement Transport, Inc. - - - - Employer

and

General Drivers, Warehousemen and Helpers Local Union 89, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America - - Petitioner

DECISION AND DIRECTION OF ELECTION
Case No. 9-RC-9380

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) the represent certain employees of the Employr.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[1]

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[1]The Employer, a Kentucky corporation, is a common carrier engaged in the business of hauling bulk and sack cement and other material from its terminal located at Kosmosdale, Kentucky.

The Petitioner seeks to represent a unit consisting of all single owner-drivers and nonowner-drivers operating equipment under lease to the Employer. There is no history of collective bargaining for these drivers. The Employer contends that the unit petitioned for is inappropriate on the basis that all such drivers are either independent contractors or employees of independent contractors and, accordingly, urges that the petition herein be dismissed. The record reflects that the Petitioner was unsuccessful in a representation election in Case No. 9-RC-6856 held on March 9, 1967 among a unit of all single owner-drivers and nonowner drivers employed by the Employer at its plant located at Kosmosdale, Kentucky, following a Board determination as to the appropriateness of such a unit. *Cement Transport, Inc.*, 162 NLRB 1262.

The record reflects that the cement transported by the Employer is done pursuant to a contract with Kosmos Portland Cement Company, which has a plant at Kosmosdale, Kentucky. In addition, the record shows that the Employer has a contract with Diamond Crystal Salt Company to transport salt from said company's Louisville, Kentucky terminal. The Employer utlizes but one driver to fulfill its contract with Diamond Crystal.

The record shows that the Employer does not own any of the tractors used in any of its over-the-road hauling operations. The tractors used by the Employer in the operation of its business are leased. A separate lease agreement is executed with respect to each tractor used regardless of the number of tractors an individual may have leased to the Employer. The record shows, however, that the Employer provides all the trailers used in its over-the-road operations and further maintains a shop at its Kosmosdale, Kentucky location for the purpose of servicing its trailers. To operate its shop, the Employer employs mechanics, tire changers and yard-

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men. None of the shop employees work on the leased tractors used in the Employer's operations. The record reflects that these shop employees are represented by Local Union No. 370, United Cement, Lime and Gypsum Workers International Union. The Petitioner does not seek to represent any of these employees.

The following are the various categories of owners and drivers of equipment utilized by the Employer in its operations:

Owner-nondrivers. These individuals lease equipment to the employer, but do no driving themselves. The parties are in agreement and the record supports the conclusion that these individuals should be excluded from any unit found appropriate.

Single owner-drivers. These drivers own and drive a single tractor unit which they lease to the Employer.

Multiple owner-drivers. These drivers own more than one tractor which they lease to the Employer. A multiple owner-driver drives one of his own units and employs other non-owner-drivers to drive the remainder of the tractors he has leased to the Employer.

Nonowner-drivers. These drivers drive leased tractors for the tractor owners.

The record shows that the Employer operates as an interstate motor vehicle common carrier pursuant to certificates of public convenience and necessity granted by the Interstate Commerce Commission, herein called the ICC. It also operates under the authority of the Kentucky Department of Motor Transportation. The Employer's operations are subject to the Interstate Commerce Act and to the regulations promulgated thereunder by the ICC. The record discloses that under these regulations, a carrier is permitted to augment its equipment by way of lease. However, these regulations require the carrier to have "full direction and control of such vehicles" and to be "fully responsible for the operations thereof in accordance with applicable law and regulations, as if the carrier were the owner of such vehicle." All of the drivers involved herein haul under the authority of the Employer. The record shows that each tractor leased to the Employer must bear the name of the Employer as well as the Employer's ICC certificate numbers.

The relationship between the Employer and the owner non-drivers, single owner-drivers and multiple owner-drivers is based on the terms of a Lease Agreement. Each lease runs for one year and is subject to termination by either party to the lease upon 30 days written notice, or, immediately, if either party violates the agreement. The lease provides that the tractors "shall be devoted

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exclusively to the carrier's business of transportation as much and as often as may be reasonably required by such business. . . ." The lease also requires the tractors to meet the requirements of the ICC rules and regulations as well as state and federal laws. The lease further provides that the tractors are to be operated by the owner or owners' employees "under the direct supervision and control of the carrier for any useful purpose in connection with the transportation performed for the Employer for the duration of the contract."

In addition, the tractor owners are obligated under the lease to furnish "a full complement of competent drivers . . .," to "pay all the compensation of every character of said drivers . . ." and to "pay all taxes, charges, benefits, claims and liabilities of every kind which may arise by virtue of their employment." The tractor owners, in return for the use of their equipment and services of themselves or their drivers, receive payments from the Employer based on the amount of freight carried and the mileage covered according to certain geographical zones.

An owner desiring to lease a tractor to the Employer makes out a written application to the Employer at its Kosmosdale, Kentucky terminal. Although the record discloses that the Employer has no requirement as to the make or model of the tractors leased to it, the Employer's safety director initiates a safety check on all tractors prior to the Employer's executing a lease agreement with the owner. The Employer also requires that 30-day periodic inspections be conducted by its safety director on all leased tractors. Each driver must submit to a physical examination before he is allowed to drive for the Employer and for periodic physical examinations thereafter. In this regard, the Employer designates the examining physician and pays the entire cost of all such examinations. While the record shows that the owner of a tractor has the right to hire his own drivers, every driver of leased equipment must submit an application for employment to the Employer. Thereafter, the Employer checks on the qualifications of the proposed driver and if he meets the requirements of the Employer, the Employer informs the owner that he may hire the driver.

The expenses of operating the tractors are borne by the tractor owners. In addition, all vehicle maintenance is paid for by the owner as is the purchase of fuel, oil, tires and safety equipment required by state and federal laws. The Employer does, however, provide fueling facilities at its Kosmosdale, Kentucky terminal for the convenience of the drivers, and, in addition, furnishes fuel on a credit basis, deducting the cost of such fuel from the owner's weekly reimbursement. The Employer also pays for all cargo and liability insurance, with the exception of "bobtailing" insurance, which is paid for by the tractor owners. Each driver is reimbursed on a daily basis for any amount expended on tolls.

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The record also shows that the Employer provides a Blue Cross-Blue Shield Health and Accident Insurance plan for the drivers. Under this plan, the Employer pays one-half of the premium and the drivers pay the balance. The Employer has also instituted an investment savings program for its drivers whereby the Employer will match the amount saved by the driver up to a maximum of $25.00 per month. This fund is administered by a separate agency and the participants have a say with respect to the investments that are made with their money. Participation by the drivers in both the Health and Accident Insurance plan and the savings program is optional.

The record shows that all drivers are assigned hauls by the Employer's dispatcher on a first-in, first-out basis. In order to be eligible for a haul, the drivers must sign in on a list maintained by the Employer. Although the owners and drivers of the leased equipment frequently interchange trips, there is a rule in effect that if a driver refuses to take a load, he will not be permitted to drive for the Employer for a period of three days. In addition, the record shows that at the time the drivers pick up a load they are provided with a bill of lading by the Employer which contains instructions as to date, time and place of delivery. While the record contains some testimony to the effect that the Employer does not exercise any control over the route to be used by the driver, the Lease Agreement hereinabove referred to provides that "notice and information with respect to the pick-up, *routing* and delivery of the trailer to be pulled by the driver shall be given by the carrier to the driver in advance of each trip. . . ." (Emphasis supplied.)

While the record reflects that tractor owners are not required to haul exclusively for the Employer and have, in fact, hauled for other employers while under a leasing agreement with the Employer, the Lease Agreement requires that all tractors be devoted exclusively to the Employer's business when necessary to meet his transportation demands. The record also shows that all drivers are required to prepare and submit log sheets which must show all operations for each day, as required by state and ICC regulations. The record further shows that the Employer's dispatcher has the authority to prohibit a driver from making a trip if the load he is expected to take will cause him to exceed the 10-hour daily limit in driving time.

In making a determination as to whether an indivdual is an independent contractor or an employee, the Board applies the common law "right of control" test. Under this test, the employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be

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used in reaching such ends. The application of this test demands a balancing of all the evidence relevant to the relationship. *National Freight, Inc.*, 153 NLRB 1536; *Indiana Refrigerator Lines, Inc.*, 157 NLRB 539; *Cement Transport, Inc.*, 162 NLRB 1261.

In applying this test to the instant case, there are concededly some factors that indicate that the owner-drivers are independent contractors and that the nonowner-drivers are employees of independent contractors. Thus, as heretofore noted, the Lease Agreement provides that the tractor owner shall pay the wages or other fringe benefits of the nonowner-drivers of their leased equipment; the owners must bear the cost of operating, repairing and maintaining their tractors; the owners are responsible for making payroll deductions on behalf of the nonowner-drivers of leased equipment for Social Security, income taxes and unemployment compensation; and the owners apparently are given some freedom in the selection of their routes. In addition, the owners have some opportunity to increase their profits by saving money on purchases of parts and repair costs, and by hauling for other customers when the Employer's business is slow.

These factors, however, are in my judgment outweighed by others which establish extensive employer control over the owner-drivers and/or their drivers; accordingly, I am constrained to conclude that, on the balance of the evidence and the record as a whole, that the owner-drivers and/or their drivers are employees of the Employer within the meaning of the Act. In reaching this conclusion, I rely on the following heretofore noted factors: the overall effect of the ICC regulations, requiring, as they do, comprehensive employer control over the operations of the tractor owners, the drivers, and the leased equipment; the lease providing for the Employer's use and control of the leased equipment; the fact that the rental payments made to tractor owners for hauling the Employer's freight are unilaterally set by the Employer; the fact that either party may terminate the lease without cause on 30 days written notice, or immediately if one party violates the Agreement; the fact that the tractor owners are required to submit their equipment to a safety check by the Employer; the fact that if a driver "signs in" but refuses to take a load, he is, in effect, disciplined by not being allowed to drive for the Employer for a period of three days; the fact that once a driver "signs in" he is bound by the bill of lading furnished him by the Employer as to the date, time and place of delivery; the fact that the drivers are required to submit a driver's log to the Employer; the fact that all owner-drivers and drivers are required to file an application for employment with the Employer; the fact that each driver must undergo a physical examination at the expense of the Em-

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ployer; the fact that the Employer has instituted a health and accident insurance plan and savings investment program for the owners and drivers; and, finally, the fact that each tractor is required to exhibit the Employer's name and ICC certificate number.

In view of the foregoing, and on the basis of the record as a whole, I find that the single owner-drivers and the nonowner-drivers operating equipment under lease to the Employer are employees of the Employer within the meaning of the Act and constitute a unit appropriate for the purposes of collective bargaining. *Indiana Refrigerator Lines, Inc., supra; Cement Transport, Inc., supra; Aetna Freight Lines,* 194 NLRB No. 120.

The majority of the cases cited by the Employer in its brief in support of its position that the drivers are independent contractors or employees of independent contractors were decided prior to the decision in *Indiana Refrigerator Lines, Inc., supra.* Accordingly, in light of the Board's decision in *Indiana Refrigerator,* those cases would not be controlling. Other cases relied on by the Employer are distinguishable from the instant case. Thus, in *L. C. Sinor,* 168 NLRB 467, the owner-drivers, contrary to the tractor owners in the instant case, obtained their own hauling permit from the Oklahoma Corporation Commission and displayed their own names on their trucks. The case of *Local 236, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Maxon Construction Company),* 194 NLRB No. 104, also relied on by the Employer, is likewise inapposite. This case involved a jurisdictional dispute. The Teamsters contended that they should be awarded the job of hauling ice and water to a construction site. The Board found the individual, who was hauling the ice and water, to be an independent contractor. The Employer on this job site, however, did not operate as a common carrier and was not subject to ICC regulations.

The Employer's reliance on *Deaton, Inc.,* 187 NLRB No. 102, and *Aetna Freight Lines, Incorporated, supra,* for the proposition that the Board is retreating from its holding in *Indiana Refrigerator Lines, Inc., supra,* appears misplaced. The Board in both *Deaton* and *Aetna Freight Lines* found the drivers who operated leased equipment for the Employer to be employees rather than independent contractors. Further, in arriving at this decision, the Board emphasized the control over the drivers vested in the Employer by virtue of the lease agreements therein between the parties and ICC regulations, both of which are factors clearly present in the instant case.

The record discloses that the multiple owner-drivers have and exercise the power to hire and discharge the drivers of their leased

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All single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer at its Kosmosdale, Kentucky plant; but excluding all office clerical employees, guards, multiple owner-drivers and all other supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including em-

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(Footnote continued from preceding page.)

equipment. It also appears that the multiple owner-drivers assign, transfer and responsibly direct nonowner-drivers of their equipment. I am satisfied that the foregoing supervisory authority is exercised not only for the purpose of protecting the leased equipment involved, but also as an integral part of the Employer's business operations. In these circumstances, and especially as the multiple owner-drivers have effective authority with respect to the tenure of nonowner-drivers of their leased equipment whom I have found to be employees of the Employer, I find the multiple owner-drivers are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit herein found appropriate. *Cement Transport, Inc., supra; National Freight, Inc., supra; Chemical Leaman Tank Lines, Inc.*, 146 NLRB 148.

While not specifically raised by either party, the record raises a possible issue with respect to the status of those single owner-drivers who, while they normally drive their own leased equipment, may occasionally hire second or substitute drivers. Single owner-drivers have the right to hire second or substitute drivers and some of them have done so in the past. However, the record discloses that this occurs only in rare or emergency situations. In these circumstances, and since they exercise such supervisory authority only sporadically, I find that such single owner-drivers are not supervisors within the meaning of Section 2(11) of the Act. *Huntley Industrial Minerals, Inc.*, 131 NLRB 1227; *Indiana Refrigerator Lines, Inc., supra.*

ployees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2]

Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by General

---

[2]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U. S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in Region 9, National Labor Relations Board, 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, on or before March 29, 1972. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTE: As it is necessary for this office to furnish the eligibility list, referred to in footnote 2 above, to all parties to this proceeding, please submit an original and one copy of said list.

Drivers, Warehousemen and Helpers Local Union 89, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated March 22, 1972 at Cincinnati, Ohio.

(s) John C. Getreu
Regional Director, Region 9

(Seal)

APPENDIX B

(Seal) (Seal)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We Will Not unlawfully interrogate our employees concerning their membership in or activities in behalf of Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

We Will offer to Edgar Ray Thompson the reinstatement of his most recent lease agreement.

We Will make whole Edgar Ray Thompson for any loss of pay incurred by him as a result of our discrimination against him.

We Will Not in any other manner interfere with, restrain or coerce any of you in the exercise of rights guaranteed in Section 7 of the Act.

All of you, our employees, are free to remain, withdraw, become, or refrain from becoming members of Local Union No. 89, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

Cement Transport, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

We Will notify immediately the above-named individual, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application after discharge from the Armed Forces in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio (Tel. No. (513) 684-3686)

APPENDIX C.

Statutes Involved.

The provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151, et seq.) relied upon by the Petitioner in this case are as follows:

Section 2 • • •

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 8 • • •

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • • • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date

of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1594

CEMENT TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 490 F. 2d 1024. The Board's decision and order (Pet. App. 12a-35a) are reported at 200 NLRB No. 122. Its decision in the related representation proceeding (Pet. App. 36a-46a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on January 22, 1974 (Pet. App. 1a), and a petition for rehearing was denied on March 4, 1974. The petition for a writ of certiorari was filed on April 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that Edgar Ray Thompson, an owner-driver under a lease agreement, was an employee of the company and not an independent contractor.

2. Whether substantial evidence supports the Board's finding that Thompson was discharged because of his union activities rather than because of misconduct.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the appendix to the petition, pp. 46a-48a.

STATEMENT

A. The Board's Findings of Fact

1. *The status of the Company's single-owner drivers* [1]

Cement Transport, Inc. ("the Company") transports bulk and sack cement pursuant to a hauling agreement with the Kosmos Portland Cement Company (Pet. App. 17a). It operates as an interstate motor vehicle common carrier under certificates of public convenience and necessity granted by the Interstate Commerce Commission (hereafter "ICC"), and as an intrastate carrier under the authority of the Kentucky Department of Motor Transportation (Pet. App. 38a; A. 63).[2] The Company owns the trailers used in its business, but leases tractors from various individuals—single owner-drivers, multiple owner-drivers, and owner-nondrivers (Pet. App. 38a; A. 65).[3]

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[1] The facts on this issue are derived from the record of a related representation proceeding, which was incorporated in the instant unfair labor practice proceeding (Pet. App. 16a). In the representation proceeding, which was initiated by a petition filed on January 3, 1972, by Local Union No. 89 of the Teamsters, the Board found that the Company's single-owner drivers were employees, not independent contractors, and directed an election to determine whether they desired that union as their representative (Pet. App. 36a-46a). (The definition of "employee" in Section 2(3) of the Act excludes "any individual having the status of an independent contractor.")

[2] "A." references are to the printed appendix to the briefs in the court below.

[3] Single owner-drivers own and drive a single tractor which they lease to the Company. Multiple owner-drivers own more

The Company executes a separate, standard lease covering each tractor regardless of the number of tractors leased from any single individual (Pet. App. 37a; A. 65-67). The lease provides that the tractor shall be operated under the direct supervision and control of the Company and that it "shall be devoted exclusively to the [Company's] business of transportation as much and as often as may be reasonably required by such business" (Pet. App. 38a-39a; A. 237-239). Applicable ICC regulations permit the Company to operate with leased equipment, but require it to be responsible for the "exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto * * *" (Pet. App. 38a; see also, 49 C.F.R. 1057.4(a)(4)). The lease also requires that the tractors meet all federal and state regulations; that drivers' trip logs be maintained and delivered to the Company daily; that the Company's name, ICC certificate, and State Commission sticker be displayed on the tractors; and that each driver not be permitted to drive more than 10 hours per day (Pet. App. 39a-42a; A. 236-241, 75-76, 85-86, 115). Each lease runs for one year and is subject to termination by either party on 30 days' written notice, or immediately "in the event of the breach of any of its provision[s] * * *" (Pet. App. 38a; A. 240). Rental payments made to tractor

---

than one tractor which they lease to the Company. They drive one of these tractors, and employ nonowner drivers to drive the remainder. Owner-nondrivers lease tractors to the Company, but do no driving themselves. (Pet. App. 38a.)

owners for hauling cement are unilaterally set by the Company (Pet. App. 41a; A. 124).

The expenses of operating and maintaining the tractor are paid for by its owner (Pet. App. 39a; A. 237-238). The Company, however, provides fueling facilities at its terminal on both a discount and credit basis, pays for cargo and liability insurance, and reimburses drivers on a daily basis for their toll expenses (Pet. App. 39a; A. 79-82, 111). The Company also maintains an optional Blue Cross-Blue Shield Health and Accident plan and an optional investment savings plan for the drivers (Pet. App. 40a; A. 93-94). The Company contributes half the premiums to the former and matches savings up to $25 per month for the latter (*ibid.*).

The Company initiates a safety check of the vehicle before executing a lease (Pet. App. 39a; A. 98). Thereafter, the Company inspects the tractor periodically (Pet. App. 39a; A. 147-148). Each driver is required to file an employment application with the Company. The applicant must meet Company requirements before he is permitted to operate Company vehicles (Pet. App. 39a; A. 108-109).[4] All drivers are required to undergo a physical examination, at Company expense by a physician specified by it, before they commence driving, and to periodic examinations thereafter (Pet. App. 39a; A. 107-108).

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[4] The Company notifies multiple owner-drivers and owner-nondrivers whether the applications of nonowner-drivers for their vehicles have met the Company's requirements (Pet. App. 39; A. 108-109).

Upon signing a list maintained by the Company, drivers are assigned hauls by the Company dispatcher on a first-in, first-out basis (Pet. App. 40a; A. 83). A driver who signs in and refuses to accept a load is subject to a three-day suspension (Pet. App. 40a; A. 115, 140-141). At the time a driver picks up a load the Company provides him with a bill of lading, containing instructions as to the date, time, and place of delivery (Pet. App. 40a; A. 86-87). The lease agreement provides that "notice and information with respect to the pick-up, routing and delivery of the trailer to be pulled by the driver shall be given by the Carrier to the driver in advance of each trip" (Pet. App. 40a; A. 237).

Tractor owners are not required to haul exclusively for the Company and have hauled such products as tobacco and propane gas for other companies during the winter season when the demand for cement is low (Pet. App. 40a; A. 89-90, 147). However, the tractor remains at the disposal of the Company and is subject to recall whenever the Company needs it to meet its transportation demands (Pet. App. 40a; A. 237, 239, 189-190).

Based upon these facts, the Board's Regional Director, in the representation proceeding (n. 1, *supra*), concluded that the Company's single owner-drivers and nonowner-drivers operating leased equipment were employees and not independent contractors (Pet. App. 36a-45a).[5] Applying the common law

[5] The Director found that multiple owner-drivers were "supervisors" within the meaning of Section 2(11) of the

"right of control" test, he acknowledged that "there are concededly some factors that indicate that the owner-drivers are independent contractors and that the nonowner-drivers are employees of independent contractors," but found that these factors were "outweighed by others which establish extensive employer control over the owner-drivers and/or their drivers" (Pet. App. 41a).* The Director emphasized (Pet. 41a-42a):

> the overall effect of the ICC regulations, requiring, as they do, comprehensive employer control over the operations of the tractor owners, the drivers, and the leased equipment; the lease providing for the Employer's use and control of the leased equipment; the fact that the rental payments made to tractor owners for hauling the Employer's freight are unilaterally set by the Employer; the fact that either party may terminate the lease without cause on 30 days written notice, or immediately if one party violates the Agreement; the fact that the tractor owners are required to submit their equipment to a safety check by the Employer; the fact that if a driver "signs in" but refuses to take a load, he is, in effect, disciplined by not being allowed to drive for the Employer for a period of three days; the fact that once a driver "signs in" he is bound

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Act, who are excluded from the definition of "employee" in Section 2(3) (Pet. App. 42a-43a).

* The Regional Director's decision was consistent with a 1967 Board decision involving the same drivers. *Cement Transport, Inc.*, 162 NLRB 1261. The latter decision was contrary to a 1955 decision finding them to be independent contractors. *Cement Transport, Inc.*, 111 NLRB 175.

by the bill of lading furnished him by the Employer as to the date, time and place of delivery; the fact that the drivers are required to submit a driver's log to the Employer; the fact that all owner-drivers and drivers are required to file an application for employment with the Employer; the fact that each driver must undergo a physical examination at the expense of the Employer; the fact that the Employer has instituted a health and accident insurance plan and savings investment program for the owners and drivers; and, finally, the fact that each tractor is required to exhibit the Employer's name and ICC certificate number.

2. *The discharge of single owner-driver Edgar Ray Thompson*

Edgar Ray Thompson was a single owner-driver for the Company for 17 years (Pet. App. 17a; A. 306). In June 1971, Thompson renewed his efforts to organize the Company's drivers by contacting Teamsters International Representative Donald Davis, who was assigned to Local 299 (Pet. App. 18a; A. 306-309, 382-383).[7] Davis gave Thompson a supply of authorization cards, and instructed him to get them signed (Pet. App. 18a; A. 307-309). Thereafter, Thompson began soliciting drivers to sign the

[7] Thompson contacted Davis because he had gone to a representative of Local 89 in 1969 to initiate a new union campaign, and "before we got our cards signed [Company General Manager] Epps told us how many cards we done picked up" (Pet. App. 18a-19a; A. 344-345). As a consequence of Epps' remarks, the 1969 campaign was discontinued (Pet. App. 19a).

cards, and by July 15 had obtained 38 signatures (Pet. App. 19a; A. 306-307, 290-291).[8]

During Thompson's activities, Company General Manager Epps interrogated at least three employees concerning whether Thompson had solicited them to sign authorization cards and whether they had done so (Pet. App. 20a-21a). On July 1, the Company mailed a letter to each driver emphasizing that a union would be "the worst possible thing that could happen to Cement Transport and the men who drive for us." The letter urged the drivers not to sign cards, pointing out the friendly relationship between management and the drivers and the financial benefits being paid them. The letter noted the Company's voluntary establishment of both health and savings plans and the fact that it paid 100 percent of the drivers' tolls (Pet. App. 21a; A. 492-496).

After soliciting the cards, Thompson continued propagandizing for the union. He discussed with the other drivers what he believed to be their inadequate compensation (Pet. App. 21a-22a; A. 348-351). He specifically alluded to an arrangement in his first contract with the Company which paid him 65 percent of the gross revenue derived from each haul, and noted that it had been replaced by the current

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[8] Subsequently, Thompson returned the cards to Davis who, in turn, gave them to International Representative Leon Carrier, who was assigned to Local 89 (Pet. App. 19a; A. 307-309).

zone system (Pet. App. 22a; A. 348-353, 291-292).[9] In mid-October, Thompson went to the offices of the Kentucky State Motor Transport Division and obtained copies of the Company's rates and tariffs. He duplicated these documents and distributed them to the drivers to compare against their own salaries (Pet. App. 22a-23a; A. 357-359, 316-317, 411-412).

On October 25, in response to Thompson's activity and specifically his distribution of Company tariff rates, Company President Cummins wrote Thompson that his lease was terminated (Pet. App. 23a; A. 477-479). The following day, in a telephone conversation between the two men, Cummins informed Thompson that the Company simply could not tolerate him "spreading that union poison around" (Pet. App. 13a, n. 2, 23a; A. 313-314). Cummins added that he was aware of Thompson's activities "in June," and "wondered why he did it," "why didn't [he] come and talk to [Cummins] if [he] had some problems * * * [instead of] going to get somebody else to solve his problems * * *" (Pet. App. 23a-24a; A. 479-481).

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[9] The zone system pays a flat rate for each zone (10 miles) covered by a haul (A. 490-491). Company Bookkeeper and Accountant Harry Ligon testified that the Company had always used a zone system of compensation and had never paid drivers 65 percent of the gross revenue. The Administrative Law Judge found that, regardless of the actual basis on which Thompson was paid when he started to work, Thompson believed that his first lease paid him 65 percent of the gross revenues and that his subsequent actions and discussions were undertaken in accordance with that belief (Pet. App. 22a).

B. The Decisions Below

The Board found that the determination in the representation proceeding (n. 1, *supra*) that the single-owner drivers were employees was conclusive of Thompson's status in this proceeding (Pet. App. 25a-26a). The Board rejected the Company's contention that it discharged Thompson because he defamed the Company by, *inter alia*, falsely accusing it of bribery of a union official.[10] The Board, crediting Thompson's testimony that Cummins told him "he was being let go because of the 'union poison' he was spreading around," added (Pet. App. 13a):

> We would note that Thompson was a capable driver and that he was aggressive in his union activity to achieve benefits he thought he and his fellow employees were entitled to receive. Respondent's unequivocal discharge of him for these activities cannot now be justified on the ground that Thompson's activities may have provided Respondent with another basis for his discharge. The Board's problem in such cases is to determine not whether a good reason existed for the discharge, but whether that was the real reason, and if not, whether the real reason concerned the employee's union activity (or lack thereof). * * *

---

[10] Thompson denied making the accusation, and the Administrative Law Judge made no credibility resolutions regarding it (Pet. App. 28a; A. 344-345, 347). The Law Judge did find, however, that Thompson's suspicions concerning collusion between the Company and Local 89 (see n. 7, *supra*) were "unrefuted" on this record (Pet. App. 28a-29a, 13a).

Accordingly, the Board (with Chairman Miller dissenting) held that the discharge of Thompson violated Section 8(a)(1) and (3) of the Act. The Board ordered, *inter alia*, that he be offered reinstatement to his most recent lease agreement and be made whole for loss of income resulting from the Company's discrimination (Pet. App. 34a).[11]

The court of appeals found substantial evidence to support the Board's finding that "Cement Transport has a sufficient right to control its single owner-drivers to sustain a finding that they are employees rather than independent contractors" (Pet. App. 3a-4a). It further found "substantial evidence to support the Board's conclusion that Thompson was discharged because of his union-related activities" (Pet. App. 6a). Finally, the court rejected the contention that Thompson's circulation of the bribe rumor was so outrageous as to justify his discharge in spite of his protected activities. The court agreed with the Board that (Pet. App. 10a):

> * * * Thompson had reason to suspect Company-Local 89 collaboration, since the Company had quickly found out the number of union cards obtained in 1969, when Thompson had tried to organize a unit under Local 89's auspices. Given this circumstance, * * * the rumor about Local 89-Company collusion was not "totally baseless." Whatever the specific allegations may have been

[11] The Board's further finding that the Company coercively interrogated employees concerning their union activities, in violation of Section 8(a)(1) of the Act (Pet. App. 32a), is not contested here.

> about a "bribe," even assuming that Thompson made them, they are among those matters best left to charge and counter-charge, with eventual resolution by the vote at a representative election. * * *

Accordingly, the court (with one judge dissenting) enforced the Board's order (Pet. App. 11a).

ARGUMENT

1. In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, this Court held that, in distinguishing between employees and independent contractors for purposes of the Act, "general agency principles" are to be used and "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive" (*id.* at 258). As shown above, the Board, upheld by the court below, considered the total employment relationship in concluding that the Company's single-owner drivers were employees. Petitioner's contention that the Board erred in its conclusion raises only a factual issue which does not warrant further review.

The Board cases (Pet. 8), which petitioner contends show that "it [was] treated differently, on the same basic facts, from the carriers in the most recent Board cases" (Pet. 12), are factually distinguishable. In each of those cases, the drivers were free to accept or decline loads without penalty according to their own assessment of the economic advantage to them in making a particular run. *Fleet*

Transport Co., Inc., 196 NLRB 436, 437; *Conley Motor Express, Inc.*, 197 NLRB No. 57, sl. op., pp. 5-6, 10, 80 LRRM 1399; *Portage Transfer Co., Inc.*, 204 NLRB No. 117, sl. op., pp. 4-5, 83 LRRM 1398; *Local 814, I.B.T.*, 208 NLRB No. 22, sl. op., pp. 23, 31, 85 LRRM 1518; *George Transfer & Rigging Co., Inc.*, 208 NLRB No. 25, sl. op., p. 6, 85 LRRM 1097. Here, by contrast, the Board and the court below found (Pet. App. 40a, 41a, 3a, n. 3) that the drivers were subject to discipline if they refused the first job they were assigned after checking in.

2. The Board, upheld by the court below, found that Thompson was discharged for "spreading the union poison around," not, as petitioner contends, because of his allegations against the Company. Thus, this record does not present the issue whether the Company would have been privileged to discharge Thompson because of his remarks had it, in fact, been so motivated. As the Board stated, the issue is not "whether a good reason existed for the discharge, but whether that was the real reason * * *" (Pet. App. 13a, n. 2). The resolution of this issue involves only a factual assessment which does not warrant review by this Court.

Similarly, the Board's finding, upheld by the court below, that "Thompson was [not] guilty of misconduct so outrageous as to justify his discharge in spite of his protected activities" (Pet. App. 7a), raises no issue meriting further review. "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which

must be balanced against the employer's right to maintain order and respect. * * * Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *National Labor Relations Board* v. *Thor Power Tool Co.*, 351 F. 2d 584, 587 (C.A. 7). The Board was reasonable in striking the balance in Thompson's favor. For, even assuming Thompson made the bribery allegation attributed to him, it could not be characterized as "baseless" (Pet. App. 10a, 13a, n. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

JUNE 1974.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1504

CEMENT TRANSPORT, INC., - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - Respondent

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JAMES U. SMITH, JR.
LOUIS E. WOOLERY
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Attorneys for the Petitioner

SMITH and SMITH
Louisville, Kentucky
Of Counsel:

WESTERFIELD-BOOTH CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1594

CEMENT TRANSPORT, INC., - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, - *Respondent*

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Paragraphs 4 and 5 of Rule 24 of the Revised Rules of the Supreme Court of the United States, Cement Transport, Inc., the Petitioner herein (hereafter called "the Company"), hereby files with the Court this Reply and Supplemental Brief in support of the Company's petition for a writ of certiorari.

In this Reply and Supplemental Brief, we want to address arguments first raised in the Brief for the National Labor Relations Board in Opposition to the Company's petition and to call the Court's attention to certain new cases not available to the Company at the time of the filing of its petition. More specifically, we want to (1) answer the Board's assertion that in the case at bar it passed upon the status of the Company's owner-drivers, and (2) refute the Board's fur-

ther contention (at page 13 of its Brief) that the Company's petition here "raises only a factual issue which does not warrant further review," rather than a very serious question of law and conflicting decisions by the Board and the Courts.

(1) In its brief, the Board repeatedly states that "*the Board* found that the Company's single-owner drivers were employees, not independent contractors" in both the instant unfair labor practice case and the related representation case. (Our emphasis. See pages 3 (Footnote 1), 11 and 13 of the Board's brief.) *That is simply not true.* The Board itself has not ruled on the status of the Company's single owner-drivers since *1967,* when it held them to be employees in *Cement Transport, Inc.,* 162 NLRB 1261. But see *Cement Transport, Inc.,* 111 NLRB 175 (1955), where the Board held them to be independent contractors.

The Board *never* decided this issue in the related representation case in 1972. The Company's request for review of the Regional Director's decision in that case was simply "denied" on April 20, 1972, without further explanation, by a telegram signed only "By direction of the Board." Under the Board's standard practice and procedure in this type of case, as admitted by it in *KFC National Management Corp.* v. *N.L.R.B.,* —— F. 2d ——, 74 CCH Lab. Cas. ¶10,035 (2nd Cir. May 8, 1974), it thus appears that only one member of the Board participated in the decision to deny the Company's petition for review. In any event, no grounds for that decision were ever stated on the record.

In this connection, the Board's brief to this Court states on page 13 that "the Board . . . considered the total employment relationship in concluding that the Company's single-owner drivers were employees." Again, that is not correct.

The Board *never* considered or addressed itself to the independent contractor issue in its Decision and Order in the unfair labor practice case, but instead merely affirmed "the rulings, findings and conclusions of the Administrative Law Judge" (Appendix B, page 13a). The Administrative Law Judge never really discussed or ruled on this issue either, as he slavishly relied upon *Cement Transport, Inc.,* 162 NLRB 1261 (1967), and the Regional Director's Decision and Direction of Election of March 22, 1972 in the representation case in holding that Thompson "is an employee within the meaning of the Act" (Appendix B, pages 25a-26a).

(2) The Regional Director expressly based his finding in the 1972 representation case that the drivers for the Company are employees upon the 1967 Cement Transport Case and *Indiana Refrigerator Lines, Inc.,* 157 NLRB 539 (1966) (Appendix B, page 42a). In the 1967 Cement Transport Case, the Board stated the grounds for its conclusion that the drivers are employees in Footnote 11 of its opinion, to wit:

> "We find no merit in the Employer's contention that the Board is foreclosed from deciding here that the drivers of leased equipment are employees, in view of the decision in *Cement Transport, Inc.,* 111 NLRB 175. *In that proceeding, which in-*

> *volved the same parties and the same plant as here, the Board held that the equipment owners were independent contractors* . . . The earlier decision, in our opinion, took an unduly limited view of certain aspects of the relationship between the Employer and the drivers of leased equipment, *particularly as to the impact of the ICC regulations on the extent of the Employer's control over them.* In view of the totality of the facts here, *particularly in the light of the recent decision in the Indiana Refrigerator Lines* case, *supra,* we conclude that these drivers are employees" (Our emphasis).

Thus, the Board's ultimate conclusion that Thompson was an employee is based on the ICC (and now the DOT) regulations and *Indiana Refrigerator.* Indeed, on page 13 of its brief to the Sixth Circuit in this case, the Board stated, "The pertinent government regulations governing Company operations, *alone,* establish a high degree of Company control over single owner-drivers," and "the powers necessarily exercised by the Company *pursuant to the government's regulation of the trucking industry* require it to bear complete responsibility for and to exercise substantial control over the operations of the single owner-drivers," citing *Indiana Refrigerator* (Our emphasis).

The Sixth Circuit went along with that argument and relied almost entirely on the Federal safety regulations in concluding that the Company's single owner-drivers are employees (Appendix A, pages 3a-4a). Seven of the twelve factors cited by the Regional Director in support of his decision in the 1972 representation case (see pages 7-8 of the Board's brief to

this Court) are *required* by those regulations, and the other five factors have been held by the Board not to make single owner-drivers employees rather than independent contractors (see the cases cited on page 8 of the Company's petition).

A minority of the Board (Members Fanning and Jenkins) still adhere to the view that the Federal safety regulations *per se* make single owner-drivers employees. See for example, *Florida-Texas Freight, Inc.*, 197 NLRB No. 158 (1972); *Pony Trucking, Inc.*, 198 NLRB No. 59 (1972), affd. 486 F. 2d 1039 (6th Cir. 1973); and *Deaton, Inc.*, 203 NLRB No. 172 (1973).

The one connecting link that runs through all of these cases, from *Indiana Refrigerator* on through the Sixth Circuit's decision in the instant case, is the ICC and DOT safety regulations. Those regulations provide the basis for every Board and Court ruling that single owner-drivers are employees and not independent contractors.

However, this was not always the case, just as it is not true now (if the case comes before the present majority of the Board). Before *Indiana Refrigerator, supra,* the Board uniformly held that single owner-drivers were independent contractors *despite* the safety regulations. See for instance, *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019 (1952); *Malone Freight Lines, Inc.*, 106 NLRB 1107 (1953); *Hugh Major, d.b.a. Hugh Major Truck Service,* 124 NLRB 1387 (1959); and *Reisch Trucking and Transportation Co., Inc.*, 143 NLRB 953 (1963). The majority of the

Board has reverted to that view. In addition to the cases cited on page 8 of the Company's petition, see also *Kreitz Motor Express, Inc.*, 210 NLRB No. 11 (April 10, 1974), and *Daily Express, Inc.*, 211 NLRB No. 19 (May 31, 1974).

In its brief to this Court (pages 13-14), the Board seeks to distinguish the latter cases from the case at bar *solely* on the ground that in "*each* of those cases, the drivers were free to accept or decline loads without penalty." That statement is not strictly accurate, for in one of those cases, *Fleet Transport Co., Inc.*, 196 NLRB 436 (1972), owner-drivers who refused to accept loads *were* penalized. See also, *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (6th Cir. 1944). It is significant here that *Fleet Transport* was the first case on this point decided by the new Board majority, and that it, in effect, overruled *Indiana Refrigerator* and subsequent cases.

Moreover, we wish to point out that this Court has very recently stated that a Court of Appeals "*correctly declined to resolve those inconsistencies* [between two Board decisions] *by substituting Board Counsel's rationale for that of the Board,*" citing *N.L.R.B.* v. *Metropolitan Life Insurance Company*, 380 U. S. 438 (1965) (Our emphasis). *N.L.R.B.* v. *Food Store Employees Union, Local 347*, —— U. S. ——, 40 L. Ed. 2d 612, 94 S. Ct. (May 20, 1974). In the *Metropolitan* Case, in a similar situation, the Court held that "the integrity of the administration process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . .'" Likewise,

this Court should not accept Board counsel's rationale in the present case when the Board itself has *never* in this case distinguished or even mentioned or commented upon its most recent decisions with regard to owner-drivers.

Thus, the Court is presented here squarely with the question of law as to whether or not the ICC and DOT safety regulations turn single owner-drivers into employees instead of independent contractors.

Consequently, the Court should grant the Company's petition for a writ of certiorari in the case at bar because of the conflicting Court and Board decisions on the points at issue herein, because the Sixth Circuit's decision in this case decided important questions of Federal law which have not been (but should be) settled by this Court, and because the Sixth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We therefore earnestly reaffirm the Company's request that its petition be granted.

Respectfully submitted,

JAMES U. SMITH, JR.
LOUIS E. WOOLERY
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Attorneys for the Petitioner

SMITH and SMITH
Louisville, Kentucky
Of Counsel.